

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





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p75

# 75-1385

To be argued by  
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

SHERMAN McDONALD,

Appellant.  
-----x

Docket No. 75-1385

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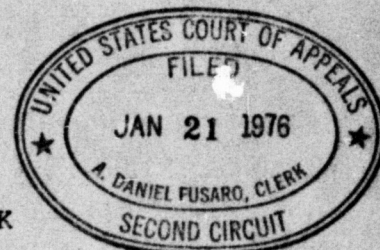
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APPENDIX TO APPELLANT'S BRIEF  
PURSUANT TO  
ANDERS v. CALIFORNIA

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK



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 LEWIS, C. Z.  
 2/15/75  
 Dr. J. E. Smith



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

75 CR 647

UNITED STATES OF AMERICA,

I N D I C T M E N T

-against-

SHERMAN MC DONALD,

Defendant. AUG 28 1975

Cr. No.

(Title 21, United States Code,  
Section 841(a)(1) and Section  
952(a))

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 13th day of August, 1975, within the Eastern District of New York, at the 39th Street Pier, Brooklyn, New York, the defendant SHERMAN MC DONALD did knowingly and intentionally possess with intent to distribute approximately one (1) pound of cocaine, a Schedule II narcotic drug controlled substance in violation of the laws of the United States. (Title 21, United States Code, Section 841(a)(1)).

COUNT TWO

On or about the 13th day of August, 1975, within the Eastern District of New York, at the 39th Street Pier, Brooklyn, New York, the defendant SHERMAN MC DONALD did knowingly and wilfully import into the United States from a place outside thereof approximately one (1) pound of cocaine, a Schedule II narcotic drug controlled substance in violation of the laws of the United States. (Title 21, United States Code, Section 952(a)).

A TRUE BILL.

*Jeannette Liano*  
FOREMAN

*David G. Trager*  
UNITED STATES ATTORNEY  
Eastern District of New York

21

THE COURT: Miss Hennessy, Ladies and gentle-

22

men of the Jury:

23

Now that you have heard the evidence and the

24

arguments of counsel, it is time for me to give you

25

instructions on the law. What I will do first is



describe the general principals that apply to all criminal trials and the nature of the charges in this case and then the specific rules of law that apply to those charges.

Something about how to evaluate the evidence you have heard, and then a few words about how to reach a verdict.

It is your duty to, as the jurors, to take the law as I state it in the instructions, whether you agree with it or not and to apply those rules as to the facts as you find them from the evidence in the case. You are the sole judges of the facts. You will perform your duties without bias or prejudice for or against any party. The law doesn't permit you to be governed by sympathy, prejudice or public opinion. At the start the law presumes the defendant to be innocent of crime and the law permits nothing but legal evidence to be presented before a Jury to be considered in support of any charge.

The presumption of innocence lasts right through until you reach a verdict and that is enough in itself to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt from all the evidence in the case that the defendant is guilty on

1  
2 a particular count. You have been selected after  
3 questions about your competency and your qualifica-  
4 tions and freedom from prejudice or sympathy. The  
5 answers that you gave them with respect to your  
6 ability to try the case fairly and impartially are  
7 just as binding now as they were then. Your obli-  
8 gation to comply with those statements continues  
9 right through until you have decided the case.

10 I am going to tell you a few words about  
11 reasonable doubt. The words speak for themselves  
12 to some extent. A reasonable doubt is a fair doubt  
13 based on reason and common sense arising either from  
14 the state of the evidence or from the absence of  
15 evidence on a point. A reasonable doubt doesn't  
16 mean a doubt a juror reaches arbitrarily in order  
17 to avoid performing an unpleasant task. It doesn't  
18 mean a possible doubt. It's rarely possible to prove  
19 anything to absolute certainty and the law doesn't  
20 require this. The question whether it's something  
21 happened on the spur of the moment does not effect  
22 reasonable doubt. People can commit serious crimes  
23 without thinking about it. They still are guilty  
24 and the Court has to determine the penalty. A test  
25 that the Court's have given for the question of



1  
2 reasonable doubt is that proof beyond a reasonable  
3 doubt refers to the type of doubt that would make you  
4 hesitate to act in your own important affairs. Where  
5 you had to listen to people's advice and you have  
6 gotten all the facts you can and you decide whether  
7 there is a reasonable ground for doing something  
8 that is a serious matter to you.

9 This proof beyond a reasonable doubt operates  
10 on the whole case. It doesn't mean that each bit  
11 of evidence must be proved beyond a reasonable doubt.  
12 It means that the sum total of the evidence must  
13 satisfy you beyond a reasonable doubt as to each  
14 element of the crime charged or else you must acquit.

15 Finding a person to be guilty of a felony  
16 and subjecting him to a criminal penalty is serious  
17 and you have a right to consider this in determining  
18 whether you have a reasonable doubt. But, if you  
19 are convinced beyond a reasonable doubt of the de-  
20 fendant's guilt you are required to find him guilty  
21 and not be swayed by sympathy. The defendant as I  
22 said before is presumed innocent. He has no obli-  
23 gation to present himself as a witness. But he may  
24 do so as he did in this case. In that event he is  
25 subject to cross examination as you have observed and

his credibility is for you the Jury to determine. It has the same weight as any other witness. You can consider the defendant has a strong motive to protect himself and decide whether to believe what he says or how much of his story to believe.

Now I come to the indictment. An indictment is just a formal method of accusing a person of a crime. It is not evidence of any kind against the accused and the fact that the Grand Jury handed down an indictment doesn't create any presumption. It doesn't let you infer anything from the fact of an indictment. The defendant has pleaded not guilty. The indictment and the plea create the issues which you must decide.

The indictment in this case has two counts. One of possession of one of importation.

Count 1 says, "On or about the 13th day of August, 1975, within the Eastern District of New York, at the 39th Street pier, Brooklyn, New York, the defendant Sherman McDonald did knowingly and intentionally possess with intent to distribute approximately one pound of cocaine, a schedule 2 narcotic controlled substance in violation of the laws of the United States.



Count 2 says, "On or about the 13th day of August, 1975, in the Eastern District of New York at the 39th Street pier in Brooklyn, New York, the defendant Sherman McDonald did knowingly and wilfully import into the United States from a place outside hereof approximately one pound of cocaine, a schedule 2 narcotic controlled drug substance in violation of the laws of the United States."

The first count charges a violation of Section 841 (a) (1) of Title 21 of the United States Code which is part of a drug abuse prevention control act. The relevant portions of that section say, "Except as authorized by this Sub-chapter it shall be unlawful for a person knowingly and intentionally manufacturing, distribute, dispensing or possessing with intent to manufacture, distribute or dispense a control substance."

A control substance is defined in Section 812 of Title 21 of the United States code.

Cocca leaves and any salt compound derivative or preparation of the cocca leaf are control substances under Schedule 2 of that Section.

The cocca leaf or cocca plant is not the cocoa we drink. It comes from a plant and it is used

1  
2 for anesthetic purposes when there is an operation  
3 or is used as a drug to snort.

4 Marijuana is a control substance on the  
5 Schedule 1 of Section 812, but is not characterized  
6 as a narcotic drug.

7 The statute refers to an intent to distribute  
8 and distribute again is defined in the statute and  
9 it does not refer to somebody distributing in the  
10 street to a lot of people. Distribution is satisfied  
11 if there is an intent to deliver to someone else.  
12 So, that bringing in cocaine with the intent to turn  
13 it over to a man in a red shirt in a bar would be  
14 a distribution of the cocaine.

15 The statute requires that the possession be  
16 made knowingly and intentionally and an act is done  
17 knowingly if it is done voluntarily and intentionally  
18 and not because of mistake or accident or any other  
19 innocent reason. For the purpose of knowingly is  
20 to insure that no one would be convicted for an act  
21 that was done because of mistake or accident. If a  
22 transaction is done intentionally, it is done knowingly. So,  
23 the two words knowingly and intentionally may be  
24 considered together. There is also a reference to  
25 wilful. An act is done wilful if it is done volun-



tarily and intentionally with the specific intent to do something the law forbids. That is to say with a bad purpose to disobey or disregard the law.

The second count of the indictment is based on Section 952 of the same title of the code. Which says it shall be unlawful to import into the customs territory of the United States of import into the United States from any place outside thereof, any control substance in the Schedule 1 or 2 of Subchapter 1 of this chapter with some exceptions that aren't applicable here.

As I have said both cocaine and marijuana are control substances. Now I referred earlier to the fact that the Government must prove the defendant's guilt beyond a reasonable doubt of each of the essential elements of the crime. That breaks down the charge into several parts which the Government must prove.

With respect to the first count, possession with intent to distribute, the Government must prove possession which may be established if the substance was fastened around the defendant's body. They must prove the substance is a control substance, that it was cocaine as charged in the indictment. They must

1  
2 prove that the defendant knew it was a control sub-  
3 stance or the charge in the indictment that he knew  
4 it was cocaine or he has closed his eyes so he  
5 wouldn't find out what it was. Finally an intent to  
6 distribute and that does involve looking into a per-  
7 son's mind. But intent can be inferred from the  
8 facts and where there is an amount of cocaine which  
9 is more than a person is likely to use for his own  
10 reasonable purposes and in the foreseeable future,  
11 you can infer he intended it to be distributed or  
12 to be turned over to somebody else.

13 With respect to the count of importation,  
14 there are three elements. First that the substance  
15 was brought into the United States. Second that it  
16 was a controlled substance, cocaine in the terms  
17 of the charge in the indictment and third that the  
18 defendant knew it was cocaine or closed his eyes to  
19 the fact which should have made him aware of the  
20 fact that it was cocaine.

21 The burden is on the Government to prove each  
22 of these essential elements beyond a reasonable  
23 doubt. This burden rests on the Government through-  
24 out the trial. No part of it ever shifts to the  
25 defendant.



1  
2 If you have a reasonable doubt as to any  
3 essential element in either count you must acquit  
4 on that count just as you have a duty to convict  
5 if you are persuaded of guilty beyond a reasonable  
6 doubt.

7 I spoke of the fact that knowledge might also  
8 take the form of unwillingness or closing your eyes.  
9 You may not find the defendant guilty of any count  
10 unless you find beyond a reasonable doubt that he  
11 knew he was importing or bringing a control sub-  
12 stance into the country. The fact of knowledge may  
13 be established by direct or circumstantial evidence  
14 like any other fact in the case. Knowledge may be  
15 proved by the defendant's conduct since we have no  
16 way of looking directly into a person's mind. In  
17 connection with the finding of knowledge, bear in  
18 mind intent is important.

19 Since it's not possible to look into a man's  
20 mind, the only way you have to arrive at a decision  
21 on such a question is to take into consideration  
22 all the facts and circumstances shown by the  
23 evidence, including the exhibits and determine  
24 whether a requisite knowledge and intent were present.  
25 It does not require direct proof. Knowledge and in-

1  
2 tent can be inferred from the surrounding circumstances  
3 and the person is presumed to intend the natural and  
4 probable and ordinary consequences of his acts.

5 If you find from all the evidence that the  
6 defendant consciously tried to avoid learning that  
7 there was cocaine in the package he was carrying in or-  
8 der to be able to say, should he be apprehended, that  
9 he didn't know, you may treat this as a deliberate  
10 avoidance of positive knowledge. It is the equiva-  
11 lent of knowledge.

12 In other words you may find the defendant  
13 acted knowingly if you find that he actually knew  
14 he had cocaine or he deliberately closed his eyes to  
15 what he had every reason to believe was the fact.  
16 But, I want to emphasize ladies and gentlemen that  
17 knowledge can't be established by showing mere neg-  
18 ligence or even foolishness on the part of the defen-  
19 dant.

20 If you find that whatever it is, from mistake  
21 or accident or any other innocent reason the defen-  
22 dant believed that the substance in the package was  
23 marijuana or some other narcotic drug and it was  
24 cocaine, then you should properly find him not guilty  
25 as far as the importation of cocaine is concerned.



I'm going to tell you something later about what you call a lesser included offense when we come to the verdict.

Now as to the rules to apply to the evidence. Generally there are two types of evidence from which a Jury can find the truth of the facts in the case. One is direct evidence, like the testimony of an eyewitness. The other is indirect, circumstantial evidence,

The proof of a chain of circumstances that logically point to the existence or non-existence of certain facts. For instance, we have a chemist's testimony. We have the testimony of the custom agent Mr. Perryman that there were packages in the defendant's belt when he came through the gate. We have the testimony of the chemist that those packages were cocaine. That is direct testimony.

We have the defendant's testimony that he didn't know it was cocaine. That also is direct testimony with respect to his knowledge and his state of mind. We have the fact that the defendant says somebody gave him \$200 to bring these packages into the port. You can consider in circumstantial evidence whether the giving of \$200 is consistent with a \$10,000

1  
2 package or \$150,000 package, depending on the base  
3 which you value it.

4 Miss Sultzer says if it had been cocaine,  
5 it would have been more. Mr. Rocco says if it was  
6 that valuable and if there was a man who came into  
7 the galley he wouldn't have turned it over to a total  
8 stranger and trusted him with it.

9 We have tape that covered all the packages  
10 and that Miss Sultzer says supports an inference to  
11 circumstantial evidence that the defendant didn't  
12 know what was inside because he couldn't see what was  
13 inside.

14 You can determine what inferences to draw  
15 from these and other facts. As a general rule the  
16 law makes no distinction between direct and circum-  
17 stantial evidence. Circumstantial evidence is enough  
18 to convict if you are satisfied with the defendant's  
19 guilt beyond a reasonable doubt on the basis of all  
20 the evidence in the case both direct and circumstan-  
21 tial.

22 Circumstantial evidence doesn't need to ex-  
23 clude every reasonable hypothesis of innocence  
24 in order to establish guilt. Bear in mind what I  
25 said. The requirement of proof



beyond a reasonable doubt it does not require that each step in the case be proved beyond a reasonable doubt. When you analyze the evidence you're entitled to draw reasonable inferences based on your own common sense and your general experience from any facts that were proved. You're not confined to the bare bones of the testimony or exhibits, but you can't speculate or guess and you have to draw the line between what is a fair inference from the facts that have been established and a guess as to something which there may be a gap in the evidence.

A difficult aspect of your duty is to determine the truth and credibility of witnesses before you and weigh their testimony. That relates primarily I think to Mr. McDonald. But, it applies legally to all the witnesses.

Judging of testimony is very like what goes on in real life. People may tell you things which may or may not through some important decision on your part, you consider whether the person to deal with has the capacity and opportunity to observe or be familiar with and remember the things they tell you about. You can consider any possible interest that they may have or any bias or prejudice. You

1  
2 consider a person's demeanor to use a colloquial  
3 expression, size him up when he tells you anything.  
4 Decide whether he strikes you as fair or candid or  
5 not. Then you consider the apparent believability  
6 of what he says. Whether it conforms with your own  
7 knowledge or experiences. It's the same thing with  
8 witnesses, you ask yourselves if they know what they  
9 are talking about. You may watch them on the stand  
10 as they testify and note their demeanor. Then decide  
11 how their testimony strikes you and whether you're  
12 going to believe it or not.

13 You can also consider whether testimony of a  
14 witness has been contradicted or corroborated by  
15 other evidence in the case. Whether there are any  
16 inconsistencies with the testimony. If a witness  
17 lies you can say that you don't believe anything the  
18 witness said or you can say that part of it is true  
19 and part of it isn't and when you come to an incon-  
20 sistency in the testimony of a witness or between  
21 witnesses, you should consider whether the inconsis-  
22 tency results from a mistake or deliberate falsehood  
23 or whether they apply to a detail or whether they  
24 apply to a really important part of the case before  
25 you.



1  
2           You are not to give any greater weight or  
3           credibility to testimony of a witness because he  
4           happens to be a Government agent. You should weigh  
5           the credibility of a Government agent as well as  
6           others. Of course you weigh the testimony of the  
7           defendant and consider his personal interest in the  
8           case.

9           As a matter of fact, the main issue here is  
10          whether Mr. McDonald really believed that this package  
11          contained marijuana or whether he knew it contained  
12          cocaine or was just trying to avoid knowing whether  
13          it was in fact cocaine.

14          Marijuana as I said is also a controlled  
15          substance but it is a different schedule and there  
16          is a substantially smaller penalty for possession of  
17          marijuana with intent to distribute and for importing  
18          marijuana than there is with respect to cocaine.

19          There is another rule that applies to evidence  
20          which is what we call a false exculpatory statement.  
21          If a man excuses himself with a statement which is  
22          not true you can consider that as evidence and con-  
23          sciousness of guilt. So, if you were to decide that  
24          there wasn't any man at all that came to the galley,  
25          you could consider that a false exculpatory state-

ment and use that as part of inference of knowledge that there was cocaine involved, but you don't have to draw any such inference and I'm not implying whether there was or there was not such a man. That is entirely for you to decide. I have given some samples from the evidence about inferences you can draw, but what I have said to you is not to be taken as an example of an opinion of guilt or innocence of the defendant. It doesn't mean that other evidence that I haven't talked about isn't as equally as important as something you should consider in reaching your verdict. You are the judges of the facts. Nothing counsel said, nothing that I have said prevents you from making your own determination on the facts and your recollection of the evidence and applying the law as I have set it forth to those facts.

Now a few words about reaching a verdict.

Your verdict must be unanimous on each count. That means you must all agree on each count. It is wise to discuss the evidence rather fully before you take even a tentative vote so no one jumps to a hasty conclusion before you weigh the entire case. Your recollection of the evidence governs. If you want to have some of the testimony repeated you may make a



1  
2 request and I will call you to the Courtroom after  
3 I got the Court Reporter and find the part you may  
4 want and have him read those portions to you. If  
5 you want to look at any of the exhibits you can ask  
6 for them. If you want to see the packages, I will  
7 have the Marshall take the plastic bags in that have  
8 the cocaine in them and bring them right out after  
9 you look at them so none of you are in possession  
10 of them. The Marshall has a right to possess them.  
11 Nobody has the right to go into the Jury room for  
12 any purposes while you are deliberating.

13 There is a rule of what is called a lesser  
14 included offense which means that if you find a  
15 person is not guilty of what is charged, but he is  
16 guilty of something else that is included within  
17 the indictment, you may find that and I have ruled  
18 that under this indictment you could find that the  
19 defendant McDonald knowingly and intentionally pos-  
20 sessed to distribute a pound of controlled substance  
21 which was not cocaine, which he did not believe to  
22 be cocaine. That he wilfully imported into the  
23 United States a pound of controlled substance. He  
24 is not charged with marijuana, but I have drawn up  
25 a form of verdict that you can find possession of

1  
2 cocaine with intent to distribute or either guilty or  
3 not guilty. Importing cocaine, guilty or not guilty.  
4 If you find him not guilty on those counts, then you  
5 could find him guilty of an attempt to possess mari-  
6 juana with intent to distribute or intent to import  
7 marijuana, because the rules with respect to a verdict  
8 say that the defendant may be found guilty of an  
9 offense not necessarily included in the indictment.  
10 An offense of an attempt to commit. Either the offense  
11 charged or the offense necessarily included therein.  
12 If the attempt is an offense. When you go into the  
13 Jury room Mrs. Hennessy is your Forelady. You should  
14 try to see that everybody gets a chance to talk, not  
15 more than one person talks at a time as a rule.  
16 During your deliberations you should all assume the  
17 position as judges, not partisans and in that way  
18 you're making a high contribution to the administra-  
19 tion of justice. You should report your verdict on  
20 both counts. If you find the defendant guilty on  
21 Count 1 or not guilty on the other or guilty on both  
22 counts or not guilty on both counts.

23 When you have reached a verdict you should  
24 give the Marshall note simply saying that you have  
25 reached a verdict. He will be sitting outside the



1  
2 Jury room and he may bring in other notes or questions  
3 you may have. When you're brought into the Courtroom  
4 Miss Hennessy will report the verdict orally and  
5 either counsel may ask that the Jury be polled. The  
6 Clerk will then ask he or she if they agree with the  
7 verdict so we're sure it is unanimous.

8 When you determine guilt or innocence, do  
9 not give any consideration to the matter of punish-  
10 ment because that is my responsibility. Because if  
11 the defendant is found guilty, you are each entitled  
12 to your own opinion, but you should exchange views  
13 with your fellow jurors. Listen carefully to each  
14 other. Don't hesitate to change your initial opinion  
15 if you are convinced that another opinion is correct.  
16 But, finally your decision must be your own and you  
17 do not have to give in to a majority if you strongly  
18 disagree.

19 I have ordered up lunch on the theory you  
20 may have to stay until 1:00 o'clock to decide the  
21 case. If you decide the case the lunch will be  
22 waiting here for you and you can wait in the Jury  
23 room for it.

24 Counsel have a right to make objections or  
25 ask for additions from what I have said. I may call

1  
2 you out in a few minutes to give you a final word.

3 Your oath sums up your duty and that is to  
4 without fear or favor to any man, you will well and  
5 truly try the issues between the parties according  
6 to the evidence given to you in Court and the laws  
7 of the United States.

8 Now I have to excuse Mrs. Brooks and Mr.  
9 Moger the two alternates. The Clerk will give you  
10 a place to wait until your lunch comes. I will ask  
11 the Clerk to swear in two Marshalls to have custody  
12 of the Jury.

13 (Whereupon, two Marshalls were sworn to  
14 keep the Jury.)

15 THE COURT: Alright, take the jurors in,  
16 please.

17 (Whereupon, the Jury retired to deliberate  
18 at 11:35 A.M.)



CERTIFICATE OF SERVICE

January 21, 1976

I certify that a copy of this brief and appendix  
has been mailed to the United States Attorney for the  
Eastern District of New York.

Sheldon Gensberg